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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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# No. 1249

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SAMUEL LEHRER,

*Petitioner,*

*vs.*

THOMAS NICKOLOPULOS

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF.

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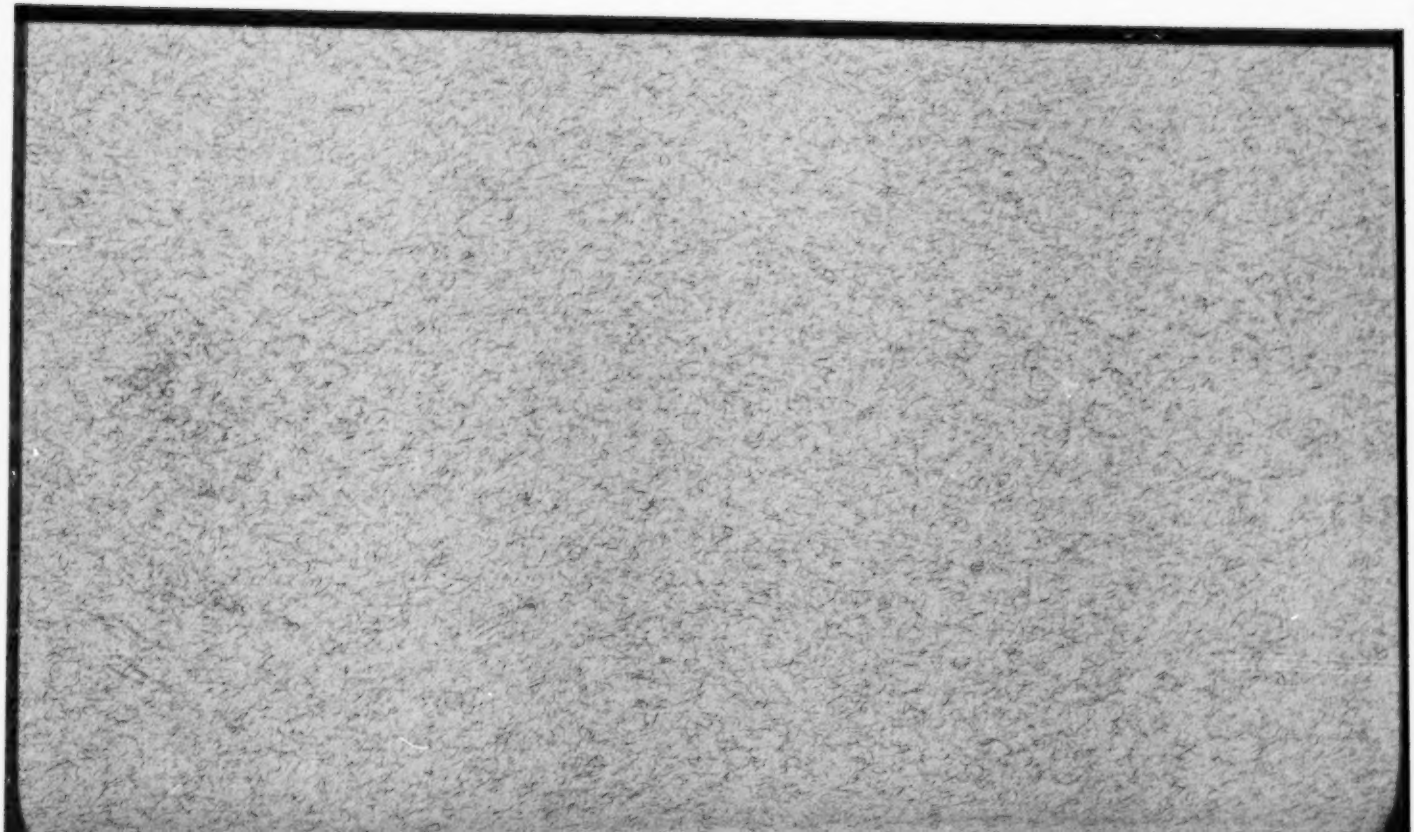

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## PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS

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*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your Petitioner, Samuel Lehrer respectfully shows:

### A

### Summary Statement of the Matter Involved

This is an application for a Writ of Certiorari to the New Jersey Court of Errors and Appeals to review a judgment affirming a judgment of the New Jersey Supreme Court. The remittitur in the New Jersey Court of Errors and Appeals affirming the said judgment was filed with the said New Jersey Court of Errors and Appeals, January 25,

1945. It was retained in said Court until February 9, 1945, when it was sent down to the Supreme Court and there filed. This practice follows rules 42 and 43 of the Rules of the New Jersey Court of Errors and Appeals (R. 41). The judgment review of which is sought here, thus became final on February 9, 1945.

Petitioner, as defendant, was sued in the New Jersey Supreme Court for the alleged breach of his covenant to pay rent under two leases (R. 4-14; 15-16). There is a purpose clause set forth in both leases, the language of which is as follows: "to be used and occupied as a store and show room for the purpose of disposing of, selling, vending and displaying automobiles, radios, refrigerators, washing machines and other electrical appliances and equipment (R. 4 & 15). Prior to December 1, 1942, the petitioner herein moved. On October 1, 1943, a rental deficiency of $2530.00 was charged against him. He was credited with $775.00 paid by another tenant and the net amount in suit became $1755.00 (R. 3).

Petitioner, as defendant in said suit, vigorously defended said suit. He pleaded in this answer that the Government of the United States of America evicted him by virtue of the fact that as a part of its War Policy, under and pursuant to and by virtue of Acts of Congress in that behalf, had and obtained the said Government promulgated orders prohibiting the production and sale of the articles set forth in the leases and that on or about December 1, 1942, the petitioner surrendered the premises to the landlord and his lease was terminated because of the action of the United States Government as above set forth (R. 19).

Petitioner in his answer also squarely set forth and contended that the orders of the said United States Government rendered performance of his undertakings impossible, that the purpose for which the said leases were executed

had been completely frustrated and the said leases, and each of them were terminated (R. 20).

Petitioner's answer was stricken (R. 28), judgment was entered against him (R. 31) and petitioner appealed (R. 33).

The New Jersey Court of Errors and Appeals was clearly confronted with the question of whether or not a Trial Court as a preliminary question of law or a jury under proper instructions from a court should be called upon to determine whether or not the promulgation of the orders in question and their enforcement might under certain circumstances depending upon local conditions and conditions in the industry, or trade in question, permit a lessee to say that there was a condition implied in law at the time of the making of the lease, that happenings of this kind would not take place during the term of the lease and if they did, the contract, though partly performed, was voidable as to the balance by the tenant, as this petitioner, and he was absolved from paying the rest of the rent if he moved and handed back the premises in good condition.

Petitioner further states that the Court below missed this question entirely although it was clearly put before the Court in the answers which the defendant filed. The New Jersey Court of Errors and Appeals also failed to deal with this question, although in the opinion of Judge Thompson, writing for the New Jersey Court of Errors and Appeals, the fact that there was a Federal question was recognized by him as was the fact that it had been raised in the Court of first instance (R. 38). That the New Jersey Court of Errors and Appeals was appreciative of the fact that your petitioner raised a serious Federal question is indicated in its opinion at the foot of page 38 and at the top of page 39 of the case, but it went far beyond the field of the record which it had before it when in the paragraph at the foot of page 39, it concluded that the Lower Court

was justified in striking the defense. The Lower Court by taking Judicial notice of the Government's orders as well as the Upper Court could not reach a sound conclusion without going further and taking proof as to the conditions in the industry in question brought about by the promulgation of the orders. Petitioner does not contend here and did not contend in the Courts below that the acts of Congress creating a War Regulation Board were unconstitutional. Neither did the petitioner contend below nor does he contend here that executive orders promulgated by the War Regulations Board are unconstitutional. Petitioner is a loyal citizen of the United States and is in favor of whatever this Government decides is best for its citizens collectively. Petitioner does, however, contend that both the Court below and the New Jersey Court of Errors and Appeals misconceived the right of a trial judge to determine the effect of these Federal orders without a hearing.

B

**Jurisdiction**

1. The date when the judgment of the New Jersey Court of Errors and Appeals, review of which is sought here became effective, February 9, 1945.

2. The jurisdiction of this Court to issue the Writ of Certiorari herein prayed for is invoked under 28 U. S. C., Section 344 (b) Judicial Code, Section 237 (b). There is claimed here on behalf of the petitioner, an immunity under the statutes of the United States and his Federal claim has been denied both in the Lower Court and in the Court of Review.

3. The jurisdiction of this Court to issue the Writ is also invoked under Rule 38 of the Court, especially paragraph 5, sub-section (a).

C

## The Question Presented

This case presents the following single question and it is the only question in the case:

Under the acts of Congress establishing the War Production Board and under the rules promulgated by said Board, if there is a single automobile in the United States of America which can be bought and sold and if there are refrigerators, radios and electrical equipment in any City or State in the United States, may the Court as here, strike an answer, or must the court after hearing, with or without the aid of a jury determine whether or not the stricture on the ordinary economic flow set into motion by lawful constituted Federal authority absolves a defendant as the petitioner here from his obligation to pay the remaining rent due under his lease?

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued out under the seal of this Honorable Court directed to the New Jersey Court of Errors and Appeals commanding that Court to certify and send to this Court for its review and examination on a day certain to be therein named, a transcript of the record and proceedings herein; that the judgment of the New Jersey Court of Errors and Appeals be reversed by this Honorable Court; and that your petitioner have such other and further relief in the premise as to this Honorable Court may seem just and meet.

JOSEPH STEINER,
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